JD–56–10
Hughesville, MD

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SOUTHERN MARYLAND ELECTRIC
COOPERATIVE, INC.

and Case 5–CA–35552

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS LOCAL 1718, AFL–CIO

Gregory M. Beatty and *Richard A. Bock, Esqs.,*
for the General Counsel.
Patrick M. Pilachowski, Esq. (Shawe & Rosenthal, LLP),
of Baltimore, Maryland, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOHN T. CLARK, Administrative Law Judge. This case was tried in Washington, D.C., on July 19, 2010. The charge was filed January 27, 2010, by International Brotherhood of Electrical Workers Local 1718, AFL–CIO (the Union) and the complaint was issued April 30, 2010. The complaint alleges that twice in December 2009 the Southern Maryland Electric Cooperative, Inc. (the Respondent) threatened employees that if the Union processed a grievance the Respondent would abide by the Family and Medical Leave Act (FMLA) more strictly and would be less generous in applying FMLA policies in the future, and thereby both times violated Section 8(a)(1) of the National Labor Relations Act (the Act). The Respondent denies essential elements of the complaint, affirmatively pleads that the Union has settled and resolved all aspects of the complaint and the underlying National Labor Relations Board's charge, and requests fees and that the complaint be dismissed.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs[1] filed by the counsel for the General Counsel and the Respondent, I make the following

[1] The counsel for the General Counsel's unopposed motion to correct the transcript is granted except that the correction designated for p. 30 is corrected to read p. 29, line 12.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Maryland corporation, with its principal office and place of business in Hughesville, Maryland, is a public utility engaged in generating and distributing electricity. During the 12 months preceding the issuance of the complaint the Respondent, in conducting its business, derived gross revenues in excess of $250,000. During that same time period the Respondent, in conducting its business, purchased and received at its Hughesville, Maryland office goods valued in excess of $5000 directly from points located outside the State of Maryland. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent and the Union are parties to a collective-bargaining agreement effective by its terms from December 1, 2006, to April 30, 2011. Article X of the collective-bargaining agreement provides for the right of the Union to file grievances concerning disputes arising under the agreement. On July 4, 2009,[2] employee Robin Parisi was on FMLA leave and did not receive holiday pay for the Fourth of July. Parisi questioned Eric Rutherford, the union president, who in turn asked Tracy Wood, the union vice president. Wood said that it was the Respondent's policy that employees who did not work the day before and the day after a holiday did not receive holiday pay. At about the same time Judy Dudley, the Respondent's compliance and employee relations director, responded to an email from Parisi regarding the same question. Dudley also said that the past practice had always been that employees had to work the day before and the day after a holiday in order to be eligible to receive holiday pay. She also made it clear that this practice applied to employees who were on FMLA leave.

After consulting the relevant sections of the collective-bargaining agreement, Rutherford and Parisi were of the opinion that she was entitled to holiday pay. On August 8, Rutherford filed a grievance with the Respondent claiming holiday pay for Parisi. The Respondent denied the grievance and Rutherford sent an information request related to the grievance to Dudley on August 19. Dudley provided the information on the day that it was requested. On September 2 Rutherford moved the grievance to the next level, where it was again denied. This denial generated a lengthier information request from Rutherford. The Respondent provided a two-page response with five attachments. At the end of the response, the Respondent opined that the "grievance should be withdrawn." Not fully satisfied with the response Rutherford made another request for information, most likely on November 6.

[2] All dates are in 2009 unless otherwise indicated.

B. The Complaint Allegations

During the early part of December, Dudley replied to Rutherford's latest information request. At the conclusion of her response Dudley wrote:

> Apparently you are taking this grievance forward, but we assure you that the Company is in compliance with the regs as they pertain to FMLA and Flexible Leave Act-and have been more than tolerant in most situations on behalf of the employee. However, your continued pursuit will result in an announcement by the company (after proper notification) that we will abide by the regs to the letter of the law-in all respects as to even approving FMLA unless it is a **serious** personal illness/family illness.
>
> Your reconsideration will be appreciated.

Unbowed Rutherford moved the grievance forward. The review at the next level is done by the Respondent's president and chief executive officer, Austin J. Slater. Slater wrote: "DECLINED-UNION SHOULD RESPECT 'PAST PRACTICE'. COMPANY WILL BE INCLINED TO BE LESS GENEROUS IN APPLYING FMLA GIVEN UNION POSITION FORWARD."

On January 19, 2010, the Union appealed the grievance to arbitration. The Union filed the unfair labor practice charge on January 27.

1. Analysis

"[T]he standard for determining whether a statement violates Section 8(a)(1) is an objective one that considers whether the statement has a reasonable tendency to coerce the employee or interfere with Section 7 rights rather than the intent of the speaker." E.g., *Smithfield Packing Co.,* 344 NLRB 1, 2 (2004) (and cited cases). Thus, the standard does not depend on the employer's motive or on the subjective reaction of the employee or whether the statement or conduct succeeded or failed. In making this determination, all of the circumstances, including the context in which the alleged unlawful statement or action occurred, are considered. E.g., *Advanced Architectural Metals, Inc.,* 351 NLRB 1208, 1216 (2007) (and cited cases).

Cindy Rauner, the Respondent's human resource manager, testified that no employee has ever been denied FMLA who has submitted a document from their physician stating that they, or a family member, has a medical issue. "We are very lenient," Rauner said. Rauner's testimony is consistent with Dudley's written response denying the grievance. She wrote that the Respondent had "been more than tolerant in most situations on behalf of the employee." Slater's denial of the grievance is also clearly on message. He wrote that "the company will be inclined to be less generous in applying FMLA." Thus, the processing of the grievance and the more strict application of the FMLA regulations are inexorable intertwined by the Respondent's director of compliance and employee relations and its president and chief executive officer. The statements are unambiguous and "may reasonably be said to have a tendency to interfere with the free exercise of employee rights under the Act." *El Rancho Market,* 235 NLRB 468, 471 (1978); *American Freightways Co.,* 124 NLRB 146, 147 (1959).

C. The Respondent's Defense

The foregoing analysis answers the Respondent's contentions except for its argument that the Union had entered into a non-Board settlement agreement that should be honored. This argument is based on a grievance meeting held on May 10, 2010. The purpose of the meeting was an attempt to settle several grievances, one of which was the FMLA grievance. Rutherford and Wood represented the Union and Slater and Dudley represented the Respondent. Slater did not testify, and the Respondent offered no explanation for his failure to do so.

Dudley testified, but not convincingly. Her demeanor was not that of an open and candid individual who is honestly trying to convey exactly what was said to the best of her ability. Her answers, even on direct examination, were equivocal and oblique. When asked if the Respondent expected a concession from the Union in return for settling the FMLA grievance she said that she "thought it was going to be the dropping of the NLRB charges." She thought this because her understanding was that if the FMLA grievance could be settled that Rutherford "would, you know, he would consider dropping the charges." On cross-examination, she admits that the Union agreed to drop the grievance and the arbitration in exchange for holiday pay for the grievant and holiday pay for future employees who were on FMLA leave.

Rutherford appeared to have the testimonial demeanor of an honest and trustworthy witness who was putting forth his best effort to tell the truth as he knew it. He also appeared to be easily confused. At times he seemed to confuse the grievance procedure with the filing of the Board charge. Although he had been the union president for over 2 years, I am not surprised that he sought Wood's counsel when Parisi first asked him about the holiday pay. Rutherford testified that after the Respondent agreed to pay the grievant holiday pay and to pay future employees on FMLA leave holiday pay, the Union agreed to drop the arbitration. Rutherford testified that at some point Slater asked him to drop the unfair labor practice charge and at another point Slater told him that he did not care what he did with the unfair labor practice charge. On its face that testimony appears inconsistent. Rutherford also stated that once the FMLA grievance was settled he attempted to use the unfair labor practice charge as leverage to get a more favorable outcome for the other grievances. In view of the fact that none of this testimony is in dispute, in an attempt at some clarity I will arrange it in what I consider the most probably sequence. As part of the initial offer to settle the FMLA grievance, or shortly after it was settled, Slater asked Rutherford to drop the unfair labor practice charge. Rutherford refused, but took Slater's request as an invitation to use the unfair labor practice charge as a negotiating chip in an attempt to obtain better settlements for the remaining grievances. It appears that Slater rebuffed each of Rutherford's offers. At some point, possibly out of frustration, Slater told Rutherford that he did not care what he did with the unfair labor practice charge.

Wood corroborated Rutherford's testimony in that Rutherford was trying to gain something for dropping the unfair labor practice charge and that Slater said that he did not care what happened with the charge. Wood was an excellent witness. Her demeanor was that of a totally credible and knowledgeable witness. She had an excellent recall of the facts and she appeared to comprehend their significance.

Having received no counter offer for his proposal to drop the unfair labor practice charge Rutherford, in what must have been a burst of irrational exuberance, told Slater that he was going to drop the unfair labor practice charge as a sign of good faith. Wood acknowledged, in an understated way, that she was not pleased with Rutherford's action. After they left the meeting Wood explained that she was angry "because the Company didn't acknowledge that they had done anything wrong and [Rutherford] didn't obtain anything for dropping them." At the risk of stating the obvious, for whatever reason, the charge was never withdrawn.

The testimony of Rutherford and Wood is consistent and mutually corroborative. I fully credit their recitation of the facts concerning the May 10 meeting. Accordingly I find, as argued by the counsel for the General Counsel, that the Union received nothing in return for its offer—no quid pro quo, and hence no binding agreement. I discredit Dudley's testimony only to the extent that it could be interpreted as inconsistent with the foregoing finding. I also find it appropriate to draw an adverse inference based on Slater's unexplained failure to testify. I conclude that had Slater testified about the May 10 meeting his testimony would have been adverse to the Respondent's position regarding a settlement agreement. E.g., *Kentucky River Medical Center,* 355 NLRB No. 129, slip op. at 12 (2010) (and cited cases).

The counsel for the General Counsel, arguing in the alternative, posits that even if there was an agreement it would not pass muster when viewed in light of the considerations for approving non-Board settlements set out in *Independent Stave Co.,* 287 NLRB 740, 743 (1987). The Respondent submits that the settlement agreement satisfies all four considerations.

If a settlement agreement, such as the one at issue, was subject to my review, I would reject it for the reasons advanced by the counsel for the General Counsel. It is obvious that the General Counsel strongly opposes the alleged agreement, which is the first *Independent Stave* consideration. The second consideration is the reasonableness of the settlement in light of the alleged violations. Under the circumstances of this case the settlement is not reasonable because it does nothing to remedy two blatant violations of the Act. The only remedy available, and the only remedy sought, is a notice posting. The Respondent must make its employees aware of their rights under the Act, it must tell them how the Respondent violated those rights, and it must give them assurances that it will not do so in the future. Providing a remedy for violations of the Act is crucial to any settlement agreement and is especially so here. The Respondent has only agreed to a quick fix regarding holiday pay for the employees on FMLA leave. The Respondent made clear its intention to obtain a permanent solution during bargaining over the next collective-bargaining agreement. Absent a remedy for these violations, the Union would be in the unenviable position of arguing for holiday pay for employees on FMLA leave while the Respondent could very well be telling the employees that it intends to maintain its position as set forth in the Respondent's answers to the grievance. Based on the foregoing, I would have rejected a settlement agreement had there one been one in this case.

I find that the Respondent has violated Section 8(a)(1) of the Act as alleged in the complaint. *St. John's Community Services—New Jersey,* 355 NLRB No. 70, slip op. at 1 (2010) (finding that the Respondent's statement: "we have to go by the book . . . makes clear that the Respondent was tightening its disciplinary policy in response to its employees' union activity.")

CONCLUSIONS OF LAW

1. The Respondent, Southern Maryland Electric Cooperative, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, International Brotherhood of Electrical Workers Local 1718, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by:

(a) Threatening its employees, including Robin Parisi, with a more strict application of FMLA regulations because they/she filed grievances or because the Union pursued such grievances through the grievance procedure.

(b) Threatening its employees, including Robin Parisi, that it would be less generous in granting FMLA leave because they/she filed grievances or because the Union pursued such grievances through the grievance procedure.

4. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically I shall recommend that the Respondent post a notice to employees in which it promises not to engage in like or related conduct which interferes with, restrains, or coerces its employees in the exercise of rights guaranteed by Section 7 of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Southern Maryland Electric Cooperative, Inc., Hughesville, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist

(a) Threatening its employees, including Robin Parisi, with a more strict application of FMLA regulations because they/she filed grievances or because the Union pursued those grievances through the grievance procedure.

(b) Threatening its employees, including Robin Parisi, that it would be less generous in granting FMLA leave because they/she filed grievances or because the Union pursued those grievances through the grievance procedure.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Within 14 days after service by the Region, post at its facility in Hughesville, Maryland, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 1, 2009.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(c) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. September 22, 2010

_____
JOHN T. CLARK
Administrative Law Judge

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with a more strict application of the Family and Medical Leave Act regulations because you filed a grievance or because the International Brotherhood of Electrical Workers Local 1718, AFL–CIO pursued that grievance through the grievance procedure.

WE WILL NOT threaten you that we will be less generous in granting Family and Medical Leave Act leave because you filed a grievance or because the International Brotherhood of Electrical Workers Local 1718, AFL–CIO pursued that grievance through the grievance procedure.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

SOUTHERN MARYLAND ELECTRIC COOPERATIVE, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

103 South Gay Street, The Appraisers Store Building, 8th Floor
Baltimore, MD 21202-4061
Hours: 8:15 a.m. to 4:45 p.m.
410-962-2822.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 410-962-2864.